Supreme Court, U. S.
FILED
JUL 10 1979
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 78-1759

JOAN E. HELM, individually and as Guardian ad Litem for DAVID WILLIAM QUEDENS, an Incapacitated Person,

Petitioner,

vs.

PACIFIC POWER AND LIGHT CO., a Maine corporation, MOBILE AERIAL TOWERS, INC., an Indiana corporation and THE IDAHO FIRST NATIONAL BANK, a National Association,

Respondents.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

FRANK J. MARTELL
GALIHER, CLARKE,
MARTELL & DONNELLY
1215 19th St. N.W.
Washington, D.C. 20036
Attorney of Record

JERIMIAH A. QUANE
QUANE, SMITH, HOWARD
& HULL
P.O. Box 519
Boise, Idaho 83701
Attorney for purposes of service

Attorneys for Respondent
Mobile Aerial Towers, Inc.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 78-1759

JOAN E. HELM, individually and as Guardian ad Litem for DAVID WILLIAM QUEDENS, an Incapacitated Person,

Petitioner,

vs.

PACIFIC POWER AND LIGHT CO., a Maine corporation, MOBILE AERIAL TOWERS, INC., an Indiana corporation and THE IDAHO FIRST NATIONAL BANK, a National Association,

Respondents.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Respondent, Mobile Aerial Towers, Inc. an Indiana corporation, respectfully urges this court to deny the Petition for Writ of Certiorari.

QUESTION PRESENTED

Whether, as respects Mobile Aerial Towers, Inc., any reason whatsoever exists for the United States Supreme Court to review the decision of the United States Court of Appeals for the Ninth Circuit, which decision affirmed the Federal District Court's dismissal of the complaint for lack of in personam jurisdiction, and/or, alternatively, the granting of summary judgment to Mobile Aerial Towers, Inc.

STATEMENT OF THE CASE

The following supplements the statement of the case presented by Plaintiff-Petitioner in her petition for writ of certiorari.

The product which forms the subject matter of this litigation as respects Mobile Aerial Towers is a "High Ranger". The High Ranger is a hydraulically operated boom and bucket system, mounted on a turn table on the bed of a truck. The boom and bucket are mobile, and may be raised, lowered, or moved laterally by an operator actuating the controls from within the bucket, or by a worker on the ground acuating the controls located on the truck bed.

David Queden's employer, Davey Tree Expert Company, purchased the High Ranger unit from its home office in Kent, Ohio, from Mobile Aerial Towers, which is located in Indiana. (Maria depo., 51: 18-22). As was noted by the District Judge herein, "all of the transactions involved here in the sale and purchase of the mobile aerial tower took place either in Indiana or Ohio." (Appendix to Petition for Writ of Certioria, p. B-8).

David Quedens (hereinafter David) held a variety of jobs for short periods prior to his injury on July 13, 1973. It is significant that among his jobs he was a tree trimmer with Asplundh Tree Expert Company, Concord, California, during 1970 and 1971, and that in 1971, he moved to Boise, Idaho, where he was a tree trimmer for Davey Tree Expert Company (hereinafter Tree Co.) from May until September, 1971. David resumed employment with Tree Co. in March, 1973, and continued working there until his injury in July of 1973. (R. 96).

David was experienced in trimming trees, and in trimming trees around power lines. (Sharpe depo., 95: 7-23; Marria depo. 22: 14-18, 33: 23-34: 1, 50: 12-15).

When David worked for Tree Co. during 1971, his status was that of a tree trimmer, and he was part of a crew whose *exclusive function* was to trim trees along utility power

lines. (R. 597-599). During this period, David attended weekly "tail gate" meetings at which the foreman stressed various safety policies. One policy stressed was that the operator of a highrise boom and bucket should never position the bucket closer than six feet from a power line. David attended the meetings and was aware of this policy. (R. 597-599).

The Tree Co., in order to submit a bid for the tree trimming work which forms the subject matter of this litigation, sent David Quedens' supervisor, James Marria, to the job site. Knowing that David would be assigned to perform the work if the Tree Co.'s bid was accepted, Marria had David accompany him to the job site in Sandpoint, Idaho. Together they viewed the premises and discussed the trimming that would be required. During this discussion, Marria called David's attention to the location of the power lines near the trees that were to be trimmed and instructed David to be careful and not to get the bucket or the boom any closer than six feet from the power lines. (R. 597-599).

Upon acceptance of the bid by the Idaho First National Bank, David and his subordinate, Alex Sharpe, traveled to the job site from Boise, Idaho. (Sharpe's depo. 59: 21-22). Work commenced on or about July 6, 1973, and progressed satisfactorily until the afternoon of July 13, 1973. (Sharpe's depo. 46: 1-17).

On July 13, in the afternoon, David was operating the boom and bucket, and his partner, Sharpe, was on the ground. There was an exchange of tools between the two men. (Boyle depo. 9: 15-20). Thereafter, David raised the bucket six to eight feet off the ground, and hesitated for approximately ten seconds while sizing up the tree he was about to begin trimming. (Boyle depo. 12: 21-13:23). At this point, David's head was approximately eight to ten feet below the wires involved. (Boyle depo., 82: 2-7). David then raised the bucket straight up and directly between two of the three overhead wires. (Boyle depo., 13: 22-23). At this point, David was ten to fifteen feet from the tree he was about to begin trimming. There were no objects other than the three wires in David's vicinity. (Boyle depol, 17: 3-14). The wires

David was between were approximately three feet apart from one another. (Boyle depo., 16: 10-14). The portion of David's body from his waist up was above these wires. (Boyle depo., 53: 14-18).

David remained motionless for a few seconds while standing bewtween these wires which passed him at waist level. (Boyle depo., 20:12). He then raised his hands to the approximate level of his nose and hollered something to his partner on the ground. (Boyle depo., 22: 20-23:16). His hands were approximately one to one and one-half feet above the wires that passed on either side of him. (Boyle depo., 22:9-15). They remained in this raised position for fifteen to twenty seconds while David was hollering groundward. (Boyle depo., 23:17-24:9). David then dropped his hands and each contacted, simultaneously, the wires that passed within inches of his body, causing electrocution. (Boyle depo., 20:12-21:10, 22:20-23:5). Sharpe hollered as he saw David being electrocuted, jumped on the back of the truck and lowered the boom and bucket by using the controls located on the turntable, which was mounted on the back of the truck. (Boyle depo., 36:12-37:16).

In addition to safety meetings held by David's employer at which the dangers inherent in trimming trees close to power lines were stressed, as was the unconditional policy of David's employer that employees maintain at least six feet between power lines and any part of the boom and bucket assembly at all times, David received relevant safety instruction from the warning decals affixed to the truck, boom, and bucket assembly, as well as from the Accident Prevention Manual and the Operating Instructions which were supplied with each High Ranger unit. (Marria depo., 31:21-32:8, 38:10-22, 43:6-44:14, 50:21-51:1, 93:2-8, 93:11-94:19, depo. Ex. 8, p.p. 44-46, depo. Ex. 2, p.p. 9-10; R. 597-599; Sharpe depo., 37:15-19).

Without setting forth verbatim the express warnings contained in the warning decals, Accident Prevention Manual, and Operating Instructions supplied with the High Ranger unit, suffice it to say that the above-referred to

warnings expressly warned that the High Ranger unit offered absolutely no electrical protection from operator contact with two energized wires.

With respect to the operability of the subject High Ranger unit, there is no question but that the product operated as it was designed to operate at all times material to this litigation. (Boyle depo., 85:8-25, 110:10-19, 28:11-18, 36:18-37:25, 118:4-12; Sharpe depo., 65:2-22, 131:7-25, 113:11-16, 114:2-8, 112:17, 115:13-116:17; Marria depo., 59:3-16).

The subject High Ranger unit incorporates an elaborate insulation system which is capable of withstanding 30,000 volts AC through any part of the bucket wall. Additionally, the upper boom assembly is constructed of fiberglass, and thus protects anyone in contact with the truck from being electrocuted should the upper boom assembly contact an energized wire. (Marria depo., Ex. 1, pp. 31-33(a)). Of course, such insulation and equipment cannot protect an individual from electrocution caused by accidental or deliberate simultaneous contact between two energized wires. (Marria depo., Ex. 2, p. 10).

The record establishes that Mobile Aerial Towers had no knowledge of any proximity warning device which could be successfully incorporated into an insulated aerial boom and/or bucket unit. (R. 500). Moreover, there is no evidence in the record which demonstrates that a proximity warning device is or was available or feasible for use on Mobile Aerial Tower's High Ranger unit, or that it was requested for use on Mobile Aerial Tower's product by David Queden's employer in its specifications. (Appendix to petition for Writ of Certiorari, p. B-4—B-5). Similarly, a co-employee of Mr. Quedens who had been in the tree trimming business for thirty-seven years as a trimmer, foreman, supervisor, and sales representative, testified that he had never seen a proximity warning device in any equipment used in tree trimming operations. (Marria depo., 46:1-3, 79:19-80:6).

REASONS FOR DENYING PETITION

As noted by the Respondent, The Idaho First National Bank, petitioner's Petition constitutes little more than rhetorical comment. Both the District Court and the Court of Appeals were twice asked to review the record to determine whether dismissal of the complaint and/or summary adjudication was appropriate, or whether there existed material issues of fact. On all four occasions, of course, both the District Court and the Court of Appeals concluded that, under the applicable law of the State of Idaho, no material issue of fact existed. The Court of Appeals, in its Order Denying Plaintiff-Appellant a re-hearing on this matter noted that it was constrained to supplement its Order denying the Petition for Rehearing because of the many misstatements made by the petitioner in her petition for re-hearing of both the record and the Court of Appeals' Memorandum Decision, which decision affirmed the District Court's holdings. (Appendix D to Petition for Writ of Certiorari, p. D-2). Incredibly, petitioner has chosen to make the same misstatements in its Petition for Writ of Certiorari to this Court.

There is no dispute that Idaho substantive law governs. *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938). Petitioner complains that the District Court and the Court of Appeals have misinterpreted Idaho law and that dismissal of the complaint and/or summary adjudication of this matter, as respects Mobile Aerial Towers, is therefore inappropriate.

Notwithstanding petitioner's contentions, the District Court found that the substantive law of the State of Idaho was contrary to the state of the law petitioner advocated, and that under the substantive law of the State of Idaho, dismissal and/or summary adjudication was proper because (1) Mobile Aerial Towers had not subjected itself to personal jurisdiction within the State of Idaho, and (2) the condition of Mobile Aerial Towers' product did not, as a matter of law, proximately cause injury to David Quedens.

The Court of Appeals reviewed the decision of the District Court, and concurred in the District Court's

finding that, under the facts of record viewed in the light most favorable to the petitioner, and under the law of the State of Idaho, dismissal of the complaint and/or summary adjudication was appropriate since the record showed that no personal jurisdiction existed over Mobile Aerial Towers, and that the condition of the product did not proximately cause injury to David Quedens.

Notwithstanding the findings of the lower courts, petitioner asks this Court to condemn the substantive law relied upon by Mobile Aerial Towers, and adopt the substantive law relied upon by the petitioner. It is a well recognized principle that the United States Supreme Court will give great deference to the determinations of the local federal judges with respect to local law, since such judges are familiar with the intricacies and trends of local law and practice. Thus, the United States Supreme Court does not, generally, examine the local law as applied by the lower courts. *Commissioner v. Estate of Bosch*, 387 U.S. 456 (1967); *Skelly Oil v. Phillips Petroleum Company*, 339 U.S. 667 (1950); *Hillsborough Twp. v. Cromwell*, 326 U.S. 620 (1945).

In short, the arguments presently before the Supreme Court have been made before by petitioner. The lower courts, on four occasions, rejected petitioner's arguments. The substantive law of the State of Idaho is contra to that advocated by petitioner. Application of Idaho substantive law to the factual record mandated dismissal of the Complaint against Mobile Aerial Towers, and/or Summary Judgment in favor of Mobile Aerial Towers, notwithstanding petitioner's attempts to misconstrue the factual circumstances in an attempt to create a material issue of fact.

CONCLUSION

It is respectfully requested that the Petition for Writ of Certiorari be denied.

Respectfully submitted this _____ day of _____ , 1979.

GALIHER, CLARK, MARTELL & DONNELLY

By _____
Frank J. Martell, Of the Firm for Respondent
Mobile Aerial Towers, Inc.

Quane Smith Howard & Hull

By _____
Jerimiah A. Quane, Of the Firm for Respondent
Mobile Aerial Towers, Inc.